Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Applications of	)	
	)	
Mobile Communications Holdings, Inc. and ICO Global Communications (Holdings) Limited for Transfer of Control	)	File No. SAT-T/C-20020719-00104
	)	
Constellation Communications Holdings, Inc. and ICO Global Communications (Holdings) Limited for Transfer of Control	)	File No. SAT-T/C-20020718-00114
	)	
Mobile Communications Holdings, Inc. for Minor Modification of 2 GHz MSS Authorization	)	File No. SAT-MOD-20020719-00105
	)	
Constellation Communications Holdings, Inc. for Minor Modification of 2 GHz MSS Authorization	)	File No. SAT-MOD-20020719-00103

JOINT OPPOSITION TO PETITION TO DENY

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SUMMARY

Commission approval of the above-captioned applications (the "Applications") for transfer of control of Constellation Communications Holdings, Inc. ("Constellation") and Mobile Communications Holdings, Inc. ("MCHI") and for minor modification of their respective 2 GHz mobile satellite service ("MSS") licenses will offer substantial public benefits without creating any countervailing harm to the public interest. The proposed transfers of control and satellite sharing arrangements will enable MCHI and Constellation to achieve significant economic and operational efficiencies, as well as to deploy service to rural and underserved areas much more quickly than otherwise would be possible. Despite these obvious benefits, the Terrestrial Carriers seek to oppose the Applications solely to prevent additional wireless competition and advance their self-interests in appropriating 2 GHz MSS spectrum for their own terrestrial use.

In order to advance this cause, the Terrestrial Carriers boldly contend that Constellation and MCHI have no 2 GHz MSS licenses to transfer or modify because they failed to meet their first milestone condition and were not qualified to obtain those licenses in the first instance. The Applications, however, clearly demonstrate that Constellation and MCHI validly hold their 2 GHz MSS licenses and have satisfied the first milestone condition for those licenses by executing non-contingent contracts that provide for implementation of their systems through satellite sharing arrangements. The Terrestrial Carriers simply ignore abundant Commission precedent demonstrating that satellite licensees can satisfy construction requirements through sharing arrangements. They also misconstrue the Commission's non-contingent contract requirement and fail to

identify any prohibited contingencies contained in MCHI's and Constellation sharing agreements.

Furthermore, the Terrestrial Carriers fail to identify any legal basis for prohibiting the Applicants from aggregating 2 GHz spectrum under the proposed transfers of control, and fail to demonstrate that the anti-trafficking rule bars the proposed equity transactions, particularly given that substantial assets, in addition to the licenses themselves, are being transferred. Significantly, neither of the proposed transferors will receive a profit from the sale of their businesses. Consequently, the Terrestrial Carriers' petition to deny offers no reasoned basis for withholding approval of the Applications.

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JOINT OPPOSITION TO PETITION TO DENY

Pursuant to Section 25.154(c) of the Commission's rules,[1] Constellation Communications Holdings, Inc. ("Constellation"), Mobile Communications Holdings, Inc. ("MCHI"), and ICO Global Communications (Holdings) Limited ("ICO" or, together with MCHI and Constellation, the "Applicants") jointly oppose the petition (the "Petition") of AT&T Wireless Services, Inc. ("AWS"), Cingular Wireless LLC ("Cingular"), and Verizon Wireless ("Verizon" or, together with AWS and Cingular, the "Terrestrial Carriers") to dismiss and deny the above-captioned applications (collectively, the "Applications").

[1] 47 C.F.R. § 25.154(c).

I. INTRODUCTION

In the year since the Commission granted the first authorizations to provide mobile satellite services ("MSS") in the 2 GHz band, the capital markets have continued to deteriorate and present extraordinary challenges for telecommunications incumbents and new entrants alike. Both Congress and the Commission have recognized the volatility of the capital markets and granted satellite companies the flexibility to revise their business plans accordingly.[2]

Under existing conditions it is clear that the capital markets will not fund the construction of all eight separate 2 GHz MSS systems authorized by the Commission, notwithstanding potential long-term demand for these systems. In response to this market reality, MCHI, Constellation, and ICO have agreed to achieve operational and cost efficiencies by consolidating corporate assets and sharing satellite infrastructure. Consequently, MCHI and Constellation each filed an application seeking Commission approval for a minor modification to change the technical specifications of its respective 2 GHz MSS system to conform with those of the ICO system and to change feeder link assignments ("MCHI Modification Application" or "Constellation Modification

[2] For example, the Commission three times has extended the deadlines for Intelsat and Inmarsat to conduct the initial public offerings ("IPOs") required under the ORBIT Act, based upon evidence demonstrating that under the existing market conditions Intelsate and Inmarsat would be unable to raise as much capital as anticipated. *See Intelsat LLC*, 16 FCC Rcd 18185, 18189 ¶ 15 (2001); *Inmarsat Ventures Ltd.*, 16 FCC Rcd 13494 (2001); *Inmarsat Ventures Ltd.*, 15 FCC Rcd 19740 (2000). Additionally, in November 2001, Congress amended the ORBIT Act to further extend Inmarsat's deadline to December 31, 2002. *See* Pub. L. No. 107-77, § 628, 115 Stat. 748, 804 (2001). More recently, Congress passed legislation, to be signed by the President, authorizing a further extension until June 30, 2004, for Intelsat to conduct its IPO. *See* S. 2810, 107th Cong. § 2 (2002). In support of the legislation, Senator Ernest F. Hollings stated that the extension was necessary because of "uncontrollable external events." *See* 148 CONG. REC. S7439 (daily ed. July 26, 2002) (statement of Sen. Hollings). He further noted that the telecommunications industry has been "unstable" and "[c]apital markets are extremely unsupportive of additional investments at this time." *Id.* Similarly, Representative Fred Upton stated that "one is hard-pressed to select a worse time for a satellite company IPO." *See* 148 CONG. REC. H6142 (daily ed. Sept. 10, 2002) (statement of Rep. Upton). The tightening of the IPO market makes it even more difficult for non-public companies to obtain capital.

Application," as the case may be, and, collectively, the "Modification Applications").[3] The Applicants also filed applications seeking Commission approval for the transfer of control of ESBH, Inc. ("ESBH")[4] and Constellation to ICO ("MCHI Transfer Application" or "Constellation Transfer Application," as the case may be, and collectively, the "Transfer Applications").[5]

The proposed sharing arrangements and transfers of control will serve the public interest by enabling the Applicants to achieve significant efficiencies and cost savings through the consolidation of corporate assets and sharing of common satellite facilities. This, in turn, will enhance wireless competition by providing for stronger competitors in the market. It also will facilitate the introduction of new services to the market more rapidly than otherwise would be possible through each company's individual efforts. As a result, the Applicants will be better positioned to attract the necessary capital to fund the deployment of their services. Ultimately, consumers, particularly those residing in rural and underserved areas, will be the primary beneficiaries because the proposed transactions will expedite the delivery of a broad array of high-quality satellite services at the lowest and most competitive costs.

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[3] The proposed modification will permit MCHI and Constellation to implement their sharing agreements with ICO (collectively, the "Sharing Agreements"), which provide for deployment of their systems through sharing satellite facilities with ICO.

[4] On September 11, 2002, the Commission approved an application for *pro forma* assignment of MCHI's 2 GHz MSS license to ESBH, a wholly owned subsidiary of MCHI. *See* Letter from Jennifer Gilsenan, Chief, Policy Branch, Satellite Division, FCC, to Tom Davidson, Counsel to MCHI (Sept. 11, 2002). For the sake of convenience, references to "MCHI" throughout this document will mean either MCHI or ESBH, as appropriate in the given context.

[5] If the Commission does not approve the Transfer Applications, the parent companies of MCHI and Constellation will retain control of the licenses, and MCHI and Constellation will continue operating under the Sharing Agreements, subject to Commission approval of the Modification Applications. Additionally, Constellation will continue to pursue the development of its MSS system in the 1.6/2.4 GHz band ("Big LEO").

At the same time, the proposed transactions will not result in any anti-competitive or other harm to the public interest. No party has been able to identify any anti-competitive, national security, law enforcement, foreign policy, or trade policy concerns raised by the proposed transfers of control. Absent any of these concerns, the Commission should find that the proposed transfers of control will serve the public interest.[6]

Despite their lack of standing and any substantive grounds upon which to file their Petition,[7] the Terrestrial Carriers seek to exploit the Applications solely to prevent additional wireless competition and advance their self-interests in appropriating 2 GHz MSS spectrum for their own terrestrial use. In opposing the Applications, the Terrestrial Carriers ignore Commission rules and precedent and the facts set forth in the Applications. The Applications plainly demonstrate that Constellation and MCHI validly hold their 2 GHz MSS licenses and have satisfied the first milestone condition for those licenses by executing non-contingent Sharing Agreements that provide for

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[6] *See Vodafone Americas Asia Inc.*, DA 02-1557, ¶ 15 (IB July 1, 2002) (under public interest analysis for transfers of control, Commission considers whether transaction raises significant anti-competitive, national security, law enforcement, foreign policy, or trade policy concerns).

[7] As a threshold matter, the Commission should dismiss the Petition because the Terrestrial Carriers lack standing. To establish standing, a petitioner must: (1) allege sufficient facts to demonstrate that grant of the subject application would cause a direct injury to petitioner; (2) demonstrate a causal link between the claimed injury and the challenged action. *See Applications of Alaska Native Wireless, L.L.C.*, 17 FCC Rcd 4231, 4235 (WTB 2002). To establish a direct injury, the harm to the petitioner must be "both certain and great; it must be actual and not theoretical." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). The Terrestrial Carriers have no legally cognizable interest in MSS spectrum or in the 2 GHz MSS licensing process. *See, e.g., Applications of Global Broadcasting Group, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 5437, 5438 ¶ 6 (1995) (concluding that even an interim operator in the spectrum at issue "has no legally cognizable interest affected by grant of a [minor] modification application filed by the permanent licensee," and therefore, lacks standing to file an application for review.); *Applications of Louisiana RSA No. 8 Limited Partnership*, Order, 12 FCC Rcd 20182, 20186 ¶ 12 (1997). They are not applicants or competitors for 2 GHz MSS spectrum. *See, e.g., Applications of Sevier Valley Broadcasting, Inc. and Mid-Utah Radio, Inc.*, 10 FCC Rcd 9795, 9796 ¶ 6 (1995) (license applicant lacks standing to file petition to deny license assignment application "because it is only a potential competitor"). The Terrestrial Carriers therefore cannot show they will be harmed by grant of the Applications.

implementation of their systems.[8] The Applications further demonstrate MCHI's and Constellation's commitment to implement their authorized systems, whether on an integrated basis with ICO pursuant to the proposed transfers of control or on a separate basis using shared facilities with ICO pursuant to the Sharing Agreements.

The Terrestrial Carriers attempt to muddy the record by inexplicably charging that Constellation and MCHI cannot meet their milestones because ICO is not in compliance with its milestones. Even disregarding the irrelevance of ICO's milestone compliance to the wholly separate issue regarding MCHI's and Constellation's milestone compliance, the Terrestrial Carriers' unwarranted attack on ICO's construction efforts is specious. In stark contrast to all other 2 GHz MSS licensees, ICO has successfully launched a satellite into orbit, substantially completed construction of the remaining satellites in its system, certified compliance with the first three of the five required milestones years ahead of the milestone deadlines, and made significant progress toward satisfying the fourth milestone. This record of achievement resoundingly settles any questions regarding ICO's commitment to implementing its system.

Furthermore, the Terrestrial Carriers fail to identify any legal basis for prohibiting the Applicants from aggregating 2 GHz spectrum under the proposed transfers of control. They also fail to demonstrate that the anti-trafficking rule bars the proposed equity transactions, particularly given that substantial assets in addition to the licenses themselves are being transferred. Significantly, neither of the transferors will receive a profit from the sale of their businesses. Consequently, the Petition offers no reasoned basis for withholding approval of the Applications.

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[8] Constellation also validly holds its Big LEO license.

II. CONSTELLATION AND MCHI HOLD VALID 2 GHz MSS LICENSES

The Terrestrial Carriers rely primarily on the spurious argument that the Applications are moot because Constellation and MCHI do not hold valid licenses to transfer or modify. The Commission should give no weight to this argument because the facts demonstrate that both licensees have satisfied all applicable license requirements and continue to diligently pursue implementation of their systems. Specifically, both licensees executed non-contingent Sharing Agreements, which provide for deployment of service within the milestone timeframe and thus satisfy the first milestone condition. In fact, implementation of the Sharing Agreements will allow the companies to launch service faster than otherwise would be possible by enabling them to share use of the ICO system, which is in an advanced stage of construction. Furthermore, the Commission should reject as grossly out of time the Terrestrial Carriers' attempt to challenge Constellation's and MCHI's basic qualifications long after the filing of the license applications. The Commission rejected this challenge more than a year ago when it awarded licenses to Constellation and MCHI. Finally, Constellation continues to validly hold its Big LEO license.

A. The Sharing Agreements Satisfy the First 2 GHz MSS Milestone Condition and Advance Milestone Objectives

The first milestone condition for all 2 GHz MSS licenses requires licensees to enter a non-contingent satellite manufacturing contract by July 17, 2002. The Commission has interpreted this condition to mean that "there will be neither significant delays between the execution of the contract and the actual commencement of

construction, nor conditions precedent to construction."[9] The first milestone is meant to preclude contracts that "do[] not create a contractual financial obligation for the licensee to proceed with the construction of its satellite," but not contracts that merely "account[] for contingencies."[10] The milestone requirement "provide[s] a uniform standard for all licensees and tangible evidence that implementation is proceeding."[11] Moreover, the cornerstone of the milestone conditions is "to ensure speedy delivery of service to the public and prevent warehousing of valuable orbital locations and spectrum."[12]

As required by the first 2 GHz MSS milestone condition, Constellation and MCHI negotiated and executed non-contingent contracts, in the form of the Sharing Agreements, within the first year of receiving their 2 GHz MSS licenses. Under those agreements, Constellation and MCHI have made binding commitments to make payments for the construction of their 2 GHz MSS systems[13] and have made substantial initial payments to ICO in accordance with their payment schedules. ICO, in turn, has a binding commitment to secure construction of those systems by delivering satellite capacity within the milestone timeframe specified in MCHI's and Constellation's

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[9] *PanAmSat Licensee Corp.*, 16 FCC Rcd 11534, 11539 ¶ 16 (2001) ("*PanAmSat*"); see also *Norris Satellite Communications, Inc.*, 12 FCC Rcd 22299, 22304-05 ¶ 9 (1997) ("*Norris*").

[10] *PanAmSat* at 11539 ¶ 16.

[11] *Norris* at 22304-05 ¶ 9.

[12] *See Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, 15 FCC Rcd 16127, 16177-78 ¶ 106 (2000) ("*2 GHz MSS Order*"); *see also Morning Star Satellite Co., L.L.C.*, 16 FCC Rcd 11550, 11552-53 ¶ 7 (2001) (milestones "ensure that licensees are building their systems in a timely manner" and "enable the Commission to determine early on if a license is being held by a licensee that is unable or unwilling to proceed with its plans"); *MCI Communications Corp.*, 2 FCC Rcd 233 (CCB 1987).

[13] *See* MCHI Sharing Agreement, July 12, 2002, § 2.3 ("MCHI Sharing Agreement") (attached to Letter from Tom W. Davidson, *et al.*, Counsel to MCHI, to Marlene H. Dortch, Secretary, FCC (July 29, 2002)); Constellation Sharing Agreement, July 16, 2002, § 2.3 ("Constellation Sharing Agreement") (attached to Letter from Robert A. Mazer, Counsel to Constellation, to Marlene H. Dortch, Secretary, FCC (July 29, 2002)).

licenses.[14] Moreover, MCHI, Constellation, and ICO each remains fully obligated to continue performance under the Sharing Agreements if the Commission does not approve the pending Transfer Applications.[15] Thus, the Sharing Agreements offer "tangible evidence that implementation is proceeding."[16]

Despite the Terrestrial Carriers' allegations, nothing in the 2 GHz MSS milestone certifications or modification applications of MCHI or Constellation suggests that either party is seeking to rely upon the separate agreement between ICO and Boeing Satellite Systems International, Inc. for construction of the ICO system (the "Boeing Agreement")[17] to satisfy their independent obligations to enter a non-contingent construction contract.[18] To the contrary, the Constellation and MCHI Applications state that "the Sharing Agreement...is sufficient to satisfy [the] first milestone."[19]

The Terrestrial Carriers incorrectly assume that the first milestone condition should be narrowly interpreted to preclude contracts that permit efficient satellite sharing arrangements. This unduly restrictive interpretation, however, is inconsistent with the dual objectives of the milestones to expedite service to the public and prevent spectrum warehousing.[20] The milestone conditions were never intended to require construction of duplicative facilities or prevent sharing arrangements that both expedite commencement

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[14] *See* MCHI Sharing Agreement § 2.8; Constellation Sharing Agreement § 2.8.

[15] *See* Application of Mobile Communications Holdings, Inc., File No. SAT-MOD-20020719-00105, at 2 n.2 ("MCHI Modification Application"); Application of Constellation Communications Holdings, Inc., File No. SAT-MOD-20020719-00103, at 2 n.2 ("Constellation Modification Application").

[16] *Norris* at 22304-05 ¶ 9.

[17] *See* Boeing Agreement (attached to Letter from Cheryl A. Tritt, Counsel to ICO, to Marlene H. Dortch, Secretary, FCC (Aug. 26, 2002)).

[18] *See* Petition of Terrestrial Carriers at 9. As discussed in Section II(C) below, the Boeing Agreement is irrelevant to the determination that MCHI and Constellation are in compliance with the first milestone.

[19] MCHI Modification Application at 13; Constellation Modification Application at 13.

[20] *See supra* note 12 and accompanying text.

of service and facilitate full use of the spectrum (thus preventing spectrum warehousing). The Sharing Agreements advance the underlying milestone objectives by providing for implementation of a shared system that will allow Constellation and MCHI to make full use of their spectrum and independently commence services on a timely basis. The Sharing Agreements obligate ICO to deliver the platform required to implement MCHI's and Constellation's systems in the same way that other construction contracts obligate the manufacturer to deliver facilities comprising the satellite system. That Constellation and MCHI will share use of the same platform with ICO is irrelevant to whether the Sharing Agreements allow Constellation and MCHI to make full use of their spectrum and implement service on a timely basis.

The Terrestrial Carriers fail to cite to any Commission rule or decision that prohibits 2 GHz MSS licensees from meeting the first milestone through sharing arrangements. In fact, they largely ignore ample Commission precedent demonstrating that satellite licensees can satisfy construction requirements through the deployment of shared systems. For example, the Terrestrial Carriers overlook numerous Commission-approved satellite sharing arrangements involving satellite services such as non-voice,

non-geostationary MSS ("Little LEO"),[21] L-band MSS,[22] fixed satellite service ("FSS"),[23] radiodetermination satellite service ("RDSS"),[24] and direct broadcast service ("DBS").[25]

In fact, MCHI's and Constellation's proposed sharing arrangements are no different from those for other Commission-approved satellite sharing arrangements. In those cases, the Commission recognized the cost savings and other efficiencies realized by allowing the satellite licensee to share transponder capacity, rather than insisting on construction of separate satellites.[26] Moreover, like other satellite licensees for whom the Commission approved sharing arrangements, Constellation and MCHI have expended considerable time, effort, and money to implement their systems.

Significantly, MCHI has invested approximately $80 million in the development of its system and acquired a number of valuable patents for its system.[27] Similarly, Constellation has entered numerous agreements with vendors and financial entities, and has invested approximately $35 million in the development of its system.[28] In addition, both companies have made substantial initial payments to ICO and have committed to make additional payments under the Sharing Agreements. These expenditures are

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[21] *See Application of Volunteers in Technical Assistance*, 12 FCC Rcd 13995 (1997) (affirming International Bureau's approval of Little LEO licensee's shared use of satellite to be constructed and launched by non-licensee) ("*VITA I*"); *Application of Volunteers in Technical Assistance*, 12 FCC Rcd 3094 (IB 1997) ("*VITA II*") (approving Little LEO licensee's shared use of satellite to be constructed and launched by experimental radio licensee).

[22] *See Application of AMSC Subsidiary Corp.*, 13 FCC Rcd 12316 (IB 1998) (approving L-band MSS licensee's purchase of 50 percent ownership interest in Canadian-licensed satellite) ("*AMSC*").

[23] *See Columbia Communications Corp.*, 16 FCC Rcd 10867 (IB 2001) ("*Columbia Recon Order*") (authorizing FSS licensee to lease capacity on NASA's TDRS-6 satellite); *Columbia Communications Corp.*, 7 FCC Rcd 122 (1991) ("*Columbia Authorization*") (authorizing FSS licensee to lease capacity on TDRS-41 and TDRS-174).

[24] *See GTE Spacenet Corp.*, 2 FCC Rcd 5312 (CCB 1987) ("*GTE*") (authorizing RDSS licensee to acquire a payload on GTE's domestic fixed satellite).

[25] *See Dominion Video Satellite, Inc.*, 14 FCC Rcd 8182 (IB 1999) ("*DVSI*") (authorizing DBS licensee to lease transponder capacity on another DBS licensee's satellite).

[26] *See, e.g., DVSI* at 8186 ¶ 11.

[27] *See* MCHI Transfer Application, Exh. 3, at 2.

comparable to those made by other satellite licensees implementing Commission-approved sharing arrangements.[29]

The attached Castiel Affidavit and Waylan Affidavit demonstrate that MCHI and Constellation each, respectively, has actively pursued the licensing, development, and deployment of its system since its inception more than a decade ago.[30] Thus, the substantial investments made by both MCHI and Constellation for an extended period, along with their execution of the Sharing Agreements, offer substantial, tangible evidence of the licensees' commitment to continue implementing their systems.

The Terrestrial Carriers suggest that the *USSB* case[31] is inapplicable because the Commission traditionally has applied a relaxed standard in assessing compliance with DBS milestones.[32] They completely ignore the fact that the Commission has permitted sharing arrangements to satisfy construction milestones applicable to satellite services other than DBS.[33] Moreover, the International Bureau's finding in *USSB* that the sharing arrangement at issue satisfied the construction contract milestone is directly applicable to the case at hand. The Terrestrial Carriers' suggestion that the Commission employs different standards in interpreting or enforcing the same construction contract milestone applicable to both DBS and 2 GHz MSS is nonsensical and without support.[34]

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[28] *See* attached Affidavit of C.J. Waylan, President and CEO of Constellation (the "Waylan Affidavit").

[29] *See, e.g., USSB* at 7250 ¶ 17; *VITA I* at 13997 ¶ 6; *VITA II* at 3101 ¶ 20. *See also* AMSC/TMI Agreement § 2.2 (Dec. 2, 1997) (approved in *AMSC* at 12316 ¶ 1).

[30] *See* attached Affidavit of David Castiel, President and CEO of MCHI ("Castiel Affidavit"); Waylan Affidavit.

[31] *Applications of United States Satellite Broadcasting Co., Inc.*, 7 FCC Rcd 7247 (MMB 1992) ("*USSB*").

[32] *See* Petition of Terrestrial Carriers at 11 n.36.

[33] *See, e.g., VITA II* at 3107-08 ¶ 42 (permitting satellite sharing arrangement to satisfy Little LEO licensee's milestone deadlines); *AMSC* at 12316 ¶ 1 (approving modification of L-band MSS license to permit satellite sharing).

[34] The Terrestrial Carriers cite to the Commission's application of the "totality of circumstances" standard in considering requests for extension of DBS due diligence milestones. *See* Petition of Terrestrial Carriers

Furthermore, the Terrestrial Carriers themselves have recognized the significant efficiencies and consumer benefits offered by infrastructure sharing arrangements. Specifically, AWS and Cingular have announced plans to form a joint venture that will allow them to pool resources and share the costs of their network build-out.[35] Under these plans, each company will contribute spectrum that will be managed by the joint venture. The companies have stated that the sharing of network build-out costs "will bring the benefits of advanced network services...to...customers many months sooner than either company could have on its own."[36] They also have touted additional benefits, including "substantial savings in capital and operating expenses."[37] Additionally, the European Commission is expected to approve network sharing arrangements for terrestrial 3G systems in the U.K. and Germany on the basis that those arrangements will provide substantial cost savings without reducing competition.[38] In view of the undisputed benefits of wireless infrastructure sharing arrangements, the Terrestrial Carriers cannot fairly claim that MCHI's and Constellation's proposed sharing arrangements will not advance the milestone objectives of expediting service to the public and preventing spectrum warehousing.

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at 11 n.36. DBS licensees may be subject to milestone compliance standards different from those that apply to other satellite licensees. *See Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, 11352-53 ¶¶ 40-44 (2002). For example, DBS licensees are not subject to 2 GHz MSS milestones requiring completion of critical design review and commencement of physical construction of their satellites. *See* 47 C.F.R. 100.19(a) (specifying DBS due diligence milestones); *2 GHz MSS Order* 16177-78 ¶ 106 (specifying 2 GHz MSS milestones). The Commission, however, has not applied different standards in assessing DBS and other satellite licensees' compliance with the same milestone condition requiring execution of construction contracts within the first year of licensing.

[35] *See* Press Release, AWS, AT&T Wireless and Cingular Wireless Announce Major Expansion of GSM/GPRS Network Coverage Via New Joint Venture (Jan. 28, 2002), *available at* www.attws.com/press/releases/2002_01/012802.html.

[36] *Id.*

[37] *Id.*

[38] *See* Susan Polyakova, *EC Will Let Operators Share 3G Rollout Costs*, COMMUNICATIONS DAILY, Sept. 11, 2002, at 6.

B. The Satellite Sharing Agreements Are Non-Contingent

The Sharing Agreements satisfy the non-contingency requirement of the first milestone condition. The Terrestrial Carriers, nonetheless, assert that performance under the Sharing Agreements is contingent upon events that have not yet occurred, such as final payment to ICO, expiration of the period for filing legal challenges to MCHI's and Constellation's milestone certifications (and the absence of any such legal challenges), and Commission approval of the pending Modification Applications.[39] It is well-established, however, that the non-contingency requirement permits construction contracts to include provisions that account for contingencies.[40] The Commission, in fact, has "distinguished between accounting for contingencies in a contract and a 'contingent contract' that does not create a contractual financial obligation for the licensee to proceed with the construction of its satellite."[41] Specifically, the Commission has noted that "[i]t is not extraordinary for construction and launch services agreements to have contingencies that may result in the termination of an agreement."[42] The Commission also has stated that construction contracts may contain provisions accounting for the possibility of Commission approval of a pending transfer of control

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[39] *See* Petition of Terrestrial Carriers at 13.

[40] *See, e.g., PanAmSat* at 11539 ¶ 16; *Columbia Communications Corp*, 15 FCC Rcd 16496 (IB 2000) ("*Columbia MO&O*").

[41] *PanAmSat* at 11539 ¶ 16.

[42] *VITA II* at 3108 ¶ 43.

application[43] or the possibility of other regulatory action.[44]

Thus, the Terrestrial Carriers' contention regarding the Commission's purported prohibition against provisions that account for various contingencies misreads well-established precedent and must be disregarded. Virtually all satellite construction contracts contain provisions similar to those in the Sharing Agreements that provide for final payment upon completion of construction and account for the possibility of Commission denial of the related modification applications, rejection of the licensees' milestone certifications, or grant of the pending transfer of control applications. None of these provisions operates to delay the actual commencement of construction or serves as a condition precedent to construction.[45] In fact, implementation of MCHI's and Constellation's systems has commenced under the Sharing Agreements; initial payments for those systems have been made to ICO; and ICO remains contractually obligated to secure deployment of those systems within the milestone timeframes required under MCHI's and Constellation's 2 GHz MSS licenses.

C. The Boeing Agreement Is Irrelevant And, In Any Event, Non-Contingent

The Terrestrial Carriers improperly attempt to bootstrap their argument addressing the Sharing Agreements by arguing that ICO's commitments under the Sharing Agreements are contingent because its separate commitments under the Boeing Agreement purportedly are contingent. ICO's obligations to MCHI and Constellation under the Sharing Agreements are separate and independent from its obligations to

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[43] *See Columbia MO&O* at 16500-01 ¶ 12.

[44] *See PanAmSat* at 11539-40 ¶ 17 (2001) (construction contract could account for possibility of Commission assignment of spectrum for inter-satellite links that would require modification of FSS system).

[45] *See supra* notes 13-16 and accompanying text.

Boeing under the Boeing Agreement. In determining whether a licensee has met its first milestone condition, the Commission focuses on the terms of the construction contract the *licensee itself* has executed, not on other contracts that the manufacturer may have with its subcontractors or other third parties.[46] An examination of the Boeing Agreement is irrelevant to whether MCHI and Constellation have met their first milestone. The Commission would abandon reasoned, well-established precedent and entangle itself in unnecessary, time-consuming, and ultimately irrelevant analysis if it attempted to review ancillary, third-party contracts to assess performance under the primary construction contract, especially where it has tangible evidence that work has been performed under the contract.

Even if the Boeing Agreement were marginally relevant, the Terrestrial Carriers fail to show that the agreement contains any impermissible contingencies. Construction contracts typically contain provisions for contract termination. The sole provision in the Boeing Agreement that the Terrestrial Carriers claim to be contingent is a clause allowing ICO to terminate the agreement for convenience.[47] The Commission recognizes, however, that "[i]t is not extraordinary for construction and launch services agreements to have contingencies that may result in the termination of an agreement."[48] Moreover, the Terrestrial Carriers ignore material portions of the termination clause in the Boeing Agreement that provide for specific penalties to be paid by ICO in the event of termination.[49] The Commission specifically has found that construction contracts may

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[46] *See, e.g., Teledesic LLC*, 17 FCC Rcd 11263 (IB 2002); *Astrolink International LLC*, 17 FCC Rcd 11267 (IB 2002).

[47] *See* Petition of Terrestrial Carriers at 12 n.41.

[48] *VITA II* at 3108 ¶ 43.

[49] *See* Boeing Agreement, Oct. 5, 1995, art. 17.1(C) (attached to Letter from Cheryl A. Tritt, Counsel to ICO, to Marlene H. Dortch, Secretary, FCC (Aug. 26, 2002)).

contain termination clauses providing for specific remedies in the event of the licensee's termination.[50]

Furthermore, the Terrestrial Carriers' contention that ICO is unwilling to complete construction of its system is pure speculation and unsupported by any evidence that ICO has failed to satisfy any applicable milestone. In fact, ICO has certified compliance with the first three of the five required milestones years ahead of the milestone deadlines and has made substantial progress on the construction of its system. Although ICO's first satellite failed to reach its intended orbit due to a launch vehicle failure, its second satellite was launched successfully on June 19, 2001 and is performing very well in orbit. The remaining satellites are in various stages of construction. Specifically, six satellites have been assembled and are in the final stages of system testing. Moreover, all satellite parts and units have been delivered for the assembly of an additional four satellites. As a result of the construction progress made, ICO has met and certified compliance with the first three of the five required construction milestones years ahead of the Commission-imposed milestone deadlines and is in substantial compliance with the fourth milestone. This places ICO well ahead of all other 2 GHz MSS licensees.

Despite ICO's demonstrated record of achievement, the Terrestrial Carriers point to news reports that ICO's construction plans are on hold as evidence of ICO's unwillingness to complete construction. ICO has advised the Commission that the "planned upgrade of its satellite system and ground network is on hold" until the Commission offers further guidance on the ancillary terrestrial component ("ATC")

[50] *See Columbia Recon Order* at 10871 ¶ 11.

issue.[51] It cannot be fairly inferred from this statement that ICO will not satisfy its milestone conditions. According any weight to speculations regarding a licensee's ability or willingness to meet future milestones would unfairly penalize the licensee for failing to satisfy a milestone before the time required for compliance.

Taken to its logical conclusion, the Terrestrial Carriers' argument would require ICO to proceed with construction without interruption and to complete construction years ahead of the milestone deadlines. It also would jeopardize the licenses of satellite companies, such as Globalstar, who are in bankruptcy and unable to perform under their construction contracts. Such a result is not required under the Commission's rules and is otherwise completely impractical, given that Commission action on ATC could affect the costs and scope of a system upgrade. If ICO were to complete construction and launch of its system well in advance of the milestone deadlines without awaiting resolution of the ATC issue, it could be effectively precluded from upgrading its system to provide for ATC capability, or forced to upgrade its system at a prohibitive cost, in the event the Commission decides to grant that authority.

In any event, any temporary construction delay does not render ICO's contractual commitments under either the Sharing Agreements or the Boeing Agreement any less binding. ICO remains contractually obligated to make required payments to Boeing under the Boeing Agreement and to secure delivery of MCHI's and Constellation's portion of the shared system under the Sharing Agreements. Boeing remains obligated under the Boeing Agreement to construct the shared system within the applicable milestone timeframe. Accordingly, the substantial payments made by ICO to date under

[51] *See* Ex Parte of ICO Global Communications at 11, *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Band*, IB Docket

the Boeing Agreement and the actual progress in the construction of the shared system offer ample evidence of ICO's commitment to proceed with construction.

D. MCHI and Constellation Are Fully Qualified to Hold Their Licenses

The Terrestrial Carriers' spurious attack on the basic qualifications of MCHI and Constellation to hold their 2 GHz MSS licenses re-hashes objections that they raised long after the filing of 2 GHz MSS license applications and that the Commission rejected when it granted the licenses more than a year ago.[52] The Terrestrial Carriers also attempt to revisit the Commission's 2 GHz MSS allocation, which has been repeatedly reaffirmed since the initial allocation in 1997.[53] In reviewing transfer of control applications, the Commission does not re-evaluate the qualifications of the transferors.[54] Thus, this is not the proper forum to consider these objections.

The Terrestrial Carriers merely resurrect the same speculative arguments made in their pending application for review of the grant of all the 2 GHz MSS authorizations.[55] As ICO previously noted, the application for review is both procedurally and substantively defective, and does not raise any new arguments not previously rejected by both the Commission and the International Bureau.[56] In particular, despite the number of years during which Constellation's and MCHI's license applications were pending before

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No. 01-185 (June 13, 2002).

[52] *See, e.g., Constellation Communications Holdings, Inc.*, 16 FCC Rcd 13724, 13733-34 ¶ 24 (IB/OET 2001) ("*Constellation Authorization*"); *Mobile Communications Holdings, Inc.*, 16 FCC Rcd 13794, 13803 ¶ 25 (IB/OET 2001) ("*MCHI Authorization*").

[53] *See Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, Memorandum Opinion and Order and Third Notice of Proposed Rule Making and Order, 13 FCC Rcd 23949, 23954 ¶ 11 (1998); *2 GHz MSS Order* at 16128-29 ¶ 1.

[54] *See Application of VoiceStream Wireless Corp.*, 16 FCC Rcd 9779, 9790 ¶ 19 (2001). The only exception occurs when the Commission has designated basic qualifications issues for hearing or a petition to deny has sufficiently raised those issues to warrant the designation of a hearing. *Id.* The Terrestrial Carriers fail to allege any material questions of fact that would warrant a designation of a hearing.

[55] *See* Application for Review of Terrestrial Carriers, File No. 188-SAT-LOI-97 *et al.* (Aug. 16, 2001).

[56] *See* Opposition of ICO Services Limited at 2, File No. 188-SAT-LOI-97 *et al.* (Aug. 31, 2001).

the Commission, the Terrestrial Carriers failed to voice any objection until just before the Commission granted the licenses. Because the time for raising objections has long passed and the Terrestrial Carriers lack any standing to oppose the grant of licenses, their attempt to challenge MCHI's and Constellation's basic qualification in this forum is frivolous and must be rejected out of hand.

III. THE RECORD SUPPORTS AN ALTERNATIVE WAIVER OR EXTENSION OF THE MILESTONES

Waiver of the milestones to permit the proposed satellite sharing arrangements would advance the underlying objectives of the milestones by enabling Constellation and MCHI to launch service faster than otherwise would be possible. It also would enable both licensees to make full use of their frequencies, thus avoiding any spectrum warehousing. Constellation and MCHI seek an extension of the milestones only in the event that the Commission determines that they have not met the first milestone and denies the waiver request. An extension in that limited circumstance is warranted in view of Commission precedent and the licensees' substantial efforts in implementing their systems and commitment to continue those efforts under the Sharing Agreements.

A. Waiver of the Milestones Would Advance the Underlying Policy Objectives and Serve the Public Interest

In opposing MCHI's and Constellation's alternative request for waiver of the milestones, the Terrestrial Carriers gloss over the important distinction that MCHI and Constellation seek a waiver of a requirement to construct separate facilities, to the extent such requirement exists, and not the milestone deadlines themselves. Using circular logic, the Terrestrial Carriers contend that the Commission should not waive any milestone condition requiring licensees to construct separate facilities because the purpose of the milestones is "to ensure that each licensee proceeds to construct its own

system."[57] They provide, however, absolutely no support for the assertion that the purpose of the construction milestones is to ensure construction of separate satellite facilities. To the contrary, the express objectives of the milestone conditions are "to ensure speedy delivery of service to the public and prevent warehousing of valuable orbital locations and spectrum."[58] As discussed in Section II(A) above, the proposed sharing arrangements would advance these objectives by providing for implementation of a shared system that will allow MCHI and Constellation to make full use of their spectrum and independently commence services on a timely basis.

The Terrestrial Carriers contend that the Commission in other decisions has rejected the argument that a waiver of unmet license conditions would bring service to the public faster than if the licenses were canceled and re-licensed. They fail, however, to offer any explanation as to how these decisions apply to the entirely different circumstances here, where a waiver to permit satellite sharing would expedite service to the public.[59] In fact, they inexplicably ignore the International Bureau's conclusion in *DVSI* that waiver of the DBS milestones to permit capacity leasing would allow "the spectrum/orbit resources [to] be put to use more quickly and efficiently than if we were to revoke [the licensee's] authorization and re-license the channels."[60]

Contrary to the Terrestrial Carriers' contention, grant of MCHI's and Constellation's alternative waiver requests on the basis of expediting service would not set a precedent for granting all other milestone waiver requests. Unlike most milestone

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[57] *See* Petition of Terrestrial Carriers at 17.

[58] *2 GHz MSS Order* at 16177-78 ¶ 106.

[59] *See* Petition of Terrestrial Carriers at 18.

[60] *DVSI* at 8186 ¶ 11. In other cases where the Commission approved satellite-sharing arrangements, it did not even find it necessary to waive any milestone conditions. *See supra* notes 21-25 and accompanying text.

waiver requests, MCHI's and Constellation's alternative waiver requests do not seek any delay in the use of assigned spectrum or delivery of service to the public. Grant of these requests, in fact, would allow MCHI and Constellation to implement their systems within the existing milestone timeframe. In addition, because a waiver would allow the licensees to make full use of their spectrum on a timely basis, it is self-evident that the waiver would advance the milestone objective of preventing spectrum warehousing.

In discounting the relevance of *DVSI*, the Terrestrial Carriers rely on the *Columbia MO&O*[61] to demonstrate the Commission's refusal to extend the waiver rationale of *DVSI* to permit sharing arrangements in other satellite services.[62] That decision, however, is inapplicable. Unlike the sharing arrangement in *DVSI* or at issue here, the Commission declined to waive the milestone conditions for Columbia because Columbia proposed to lease capacity on a satellite that did not meet the Commission's full frequency reuse requirements, which were generally applicable to domestic FSS satellites.[63] In contrast, the satellite systems proposed to be shared in *DVSI*, and under MCHI's and Constellation's Sharing Agreements, fully conform to the technical requirements generally applicable to the authorized services.

The Terrestrial Carriers also overlook numerous other Commission decisions granting milestone waivers to satellite licensees where construction of the systems had

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[61] *See Columbia MO&O.*

[62] *See* Petition of Terrestrial Carriers at 18.

[63] *See Columbia MO&O* at 16504-05 ¶ 21. Under the full frequency reuse requirements, 4/6 GHz domestic FSS satellites were required to "have a capacity equivalent to that which is provided by a space station having transponders that use 864 MHz of a 1000 MHz (with two-times frequency reuse) assignment and provide a total power of 192 watts." *Columbia Authorization* at 123, ¶ 15 n.14. 12/14 GHz domestic FSS satellites also were subject to comparable requirements. *Id.*

commenced and the licensee showed a firm commitment to proceed with construction.[64] Like those licensees, MCHI and Constellation have commenced construction by executing the Sharing Agreements and are committed to proceeding with implementation of their systems under those agreements.

B. MCHI's and Constellation's Demonstrated Commitment to System Implementation Warrants a Milestone Extension

MCHI and Constellation seek an extension of the milestone only in the unlikely event that the Commission determines that the Sharing Agreements do not satisfy the first milestone condition and also denies a waiver to permit implementation of the Sharing Agreements. In that limited circumstance, an extension would be warranted. Although the Terrestrial Carriers claim that an extension is warranted only under extraordinary circumstances beyond the licensee's control, the Commission in practice has not insisted on such a strict standard.[65] In fact, the International Bureau has noted that "in every instance where the Commission has denied a milestone extension request, construction of the satellite either had not begun or was not continuing, thus raising questions regarding the licensee's intention to proceed."[66] Unlike those cases, MCHI and Constellation have expended significant resources, including initial payments required under the Sharing Agreements, to execute a construction contract and proceed with implementation of their systems. Moreover, as demonstrated in the attached Castiel Affidavit and Waylan

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[64] *See, e.g., Astrolink* at 11267 ¶ 1 (IB 2002) (granting waiver of Ka-band construction commencement milestone because licensee had shown substantial progress, thus demonstrating that waiver would not undermine the policy of preventing spectrum warehousing); *EarthWatch Inc.*, 15 FCC Rcd 13594, 13597 ¶ 9, 13598 ¶ 11 (IB 2000) ("*EarthWatch*") (granting waiver of milestones to licensee of commercial remote-sensing satellite system because no evidence of spectrum warehousing and waiver will not preclude entry of new entrants).

[65] *See, e.g., EarthWatch Inc.* at 13596-97 ¶ 8, 13598 ¶12 (granting milestone extension even though licensee failed to show circumstances beyond its control).

[66] *Id.* at 13597-98 ¶ 10.

Affidavit, both MCHI and Constellation have actively pursued the licensing, development, and deployment of their systems for more than a decade.[67]

As discussed in Section II(A) above, in a number of cases, the Commission has found satellite sharing arrangements to comply with the milestone conditions or waived the milestones to permit those arrangements. Based on this precedent, MCHI and Constellation reasonably determined that the Sharing Agreements satisfy the first milestone condition and should not be penalized in the event the Commission decides to reverse course on this issue. MCHI's and Constellation's substantial investments in their systems and execution of the Sharing Agreements offer more than ample evidence of their commitment to proceed with construction. Accordingly, grant of their alternative extension requests is warranted.

IV. THE ANTI-TRAFFICKING RULE DOES NOT PROHIBIT THE PROPOSED TRANSFERS OF CONTROL

The Commission has concluded repeatedly that the anti-trafficking rule[68] is not intended to prevent debt or equity transactions.[69] The proposed transfers of control are precisely the type of equity transactions that the Commission intended to exempt from application of the anti-trafficking rule. Specifically, the proposed transactions represent reasonable commercial arrangements to facilitate the financing of a combined 2 GHz

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[67] *See* Castiel Affidavit; Waylan Affidavit.

[68] Section 25.143(g)(1) of the Commission's rules prohibits "trafficking" in bare 2 GHz MSS licenses. *See* 47 C.F.R. § 25.143(g)(1). The Commission generally defines "trafficking" as "obtaining or attempting to obtain an authorization for the principal purpose of speculation or profitable resale of the authorization rather than for the provision of telecommunication services to the public or for the licensee's own private use." 47 C.F.R. § 1.948(i)(1).

[69] *See, e.g., 2 GHz MSS Order* at 16185-86 ¶ 128; *Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, Report and Order, 9 FCC Rcd 5936, 6014 ¶ 203 (1994). *See also Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, Notice of Proposed Rulemaking, 14 FCC Rcd 4843 (1999) ("anti-trafficking rule could permit firms to combine operations or sell operating facilities, including their licenses, subject to Commission approval").

MSS system that will draw upon the technical, intellectual property, and other resources of the Applicants. As a result of the proposed exchange of shares of ICO, the parent companies of MCHI and Constellation will hold minority interests in ICO and will not exit the business. Because the proposed transactions involve the transfer of significant assets in addition to satellite licenses and do not result in any for-profit sale, they do not violate the anti-trafficking rule.

A. The Proposed Transfers of Control of Licenses Are Part of Larger Transactions Involving Other Valuable Assets

The Terrestrial Carriers' unsubstantiated allegations that the proposed transfers of control principally involve the transfer of licenses contradict the facts provided in the MCHI and Constellation Transfer Applications. Both applications expressly state that ICO would acquire the on-going businesses of Constellation and MCHI, including their portfolios of licenses, proprietary technical and business plans, patents, and other assets.[70]

The Commission has recognized that intellectual property is an asset that should be considered in determining whether a licensee has proposed to sell only a license.[71] Under the proposed transactions, both MCHI and Constellation will transfer to ICO valuable intellectual property for substantial consideration. MCHI will transfer to ICO 32 domestic and international issued and pending patents covering such diverse subjects as advanced orbital geometries, satellite antennas, solar arrays, satellite mobile handsets,

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[70] *See* MCHI Transfer Application, Exh. 3, at 8; Constellation Transfer Application, Exh. 3, at 8.

[71] *See NetSat 28 Co., LLC*, 16 FCC Fcd 14471 (IB 2001) ("*NetSat 28*"). In *NetSat 28*, the International Bureau declined to decide expressly whether a transfer of control of the FSS license at issue constitutes a transfer of a bare license. It stated, however, that if it were to reach the issue, it could not conclude that the transfer of control violates the anti-trafficking rule because the licensee had performed sufficient work on the system to consider it an asset and the transaction involved the transfer of valuable patents in addition to the FSS license. *Id.* at 14477 ¶ 16.

fixed satellite phone booths, and switching equipment.[72] It has been a consistent corporate policy over the years to develop new and advanced MSS technologies. Consistent with this policy, MCHI has spent tens of millions of dollars in resources and manpower to design its MSS system and develop the technology that ICO has proposed to purchase from MCHI, and MCHI has expended significant additional funds to obtain proprietary rights to the technology.[73]

Similarly, in support of the implementation of its system, Constellation has developed proprietary technical specifications for the overall system and segment level designs, air interface, satellite phased array antenna, and high gain antennas for fixed customer applications in the equatorial region.[74] Constellation also has developed a business plan, based on proprietary market research, with an initial focus on market opportunities in the equatorial program that could be efficiently extended to global coverage.[75]

MCHI's and Constellation's portfolios of intellectual property rights and proprietary business and technical plans are crucial components of ICO's plans to upgrade its system design and improve upon its business plans. Thus, the proposed transfers of control represent much more than the transfer of MCHI's and Constellation's licenses.

In an attempt to discount the number of valuable patents and patent applications

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[72] *See* Castiel Affidavit.
[73] *Id.*
[74] *See* Waylan Affidavit.
[75] *Id.*

filed by MCHI, the Terrestrial Carriers allege that "nearly half of the patents are listed as 'abandoned' or 'pending.'"[76] This is a gross mischaracterization of the list of patents included in the MCHI Transfer Application. Although this list shows that MCHI has many pending patent applications, none of the 32 listed patents and patent applications has been "abandoned."[77] Moreover, the fact that MCHI has a number of pending patent applications does not render its portfolio of patents any less valuable. In view of the significant assets held by Constellation and MCHI, the proposed transfers of control involve much more than the transfer of licenses and therefore do not fall within the scope of the anti-trafficking rule.

B. The Proposed Transfers of Control Do Not Involve Any Intent to Profit or Engage in Spectrum Speculation

Neither MCHI nor Constellation has any intent to profit from the sale of licenses or engage in spectrum speculation.[78] The Commission has found that the anti-trafficking rule does not prohibit a transfer of control of a satellite licensee where investors divesting their interests in the licensee receive no more than their total investments plus reasonable interest.[79] Moreover, the Commission has approved transfers of control where no profits were received from the transactions, even though the transactions were "not incidental to [a larger corporate transaction]" and were "clearly directed at acquiring an interest in an

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[76] Petition of Terrestrial Carriers at 23.

[77] *See* MCHI Transfer Application, App. A (Schedule of Patents). MCHI's Schedule of Patents identified only four items of intellectual property as "abandoned," but these items were clearly identified as trademarks, not patents. *Id.* The Applicants freely acknowledge that the value of MCHI's intellectual property primarily lies in MCHI's extensive patent library rather than its trademarks.

[78] The anti-trafficking rule prohibits trafficking, which is defined as "obtaining or attempting to obtain an authorization for the principal purpose of speculation or profitable resale of the authorization." 47 C.F.R. § 1.948(i)(1).

[79] *See, e.g., NetSat 28* at 14476-77 ¶ 15 (anti-trafficking rule does not prohibit investors from recouping their total investments plus an eight percent rate of return); *Visionstar, Inc.*, 16 FCC Rcd 19187, 19192 ¶ 19 (IB 2001) (no profit where investor would recoup their total investments plus reasonable rate of return).

application."[80] Far from earning a return on their investment, the parent companies of both MCHI and Constellation are selling their operations to ICO for much less than they have invested. Additionally, the consideration consists primarily of restricted shares of ICO common stock for which there is no trading market or other liquidity opportunity. The Affidavits of Craig Jorgens, President of ICO (the "Jorgens Affidavits"), specify the consideration received by the parent companies of MCHI and Constellation in exchange for their ownership interests.[81] Therefore, because MCHI and Constellation will not profit from the proposed transactions, no impermissible trafficking of licenses will occur.

As stated in their Transfer Applications, MCHI has invested approximately $80 million in the development of its system,[82] and Constellation has invested approximately $35 million dollars in the development of its system.[83] In addition, both companies have made substantial initial payments to ICO and have committed to make additional payments under the Sharing Agreements. These payment amounts have been disclosed to the Commission in unredacted copies of the Sharing Agreements, filed pursuant to requests for confidential treatment.[84]

As the Commission is aware, the satellite industry is facing severe economic hardship and has become disfavored by the financial community. Valuations and total

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[80] *See Starsys Global Positioning, Inc.*, 11 FCC Rcd 1237, 1238 ¶ 10 (IB 1995) (citing *Satellite CD Radio, Inc.*, 9 FCC Rcd 2569 (CCB 1994)); *see also Pan American Satellite Corp.*, 2 FCC Rcd 441 (CCB 1987) (approving transfer of control of satellite license applicant, even though primary purpose of transaction was to acquire interest in application, where payment for sale of ownership interest was shown to be less than amount incurred in preparing, filing, and advocating grant of authorization).

[81] *See* Jorgens Affidavits (filed concurrently herewith pursuant to a request for confidential treatment).

[82] *See* MCHI Transfer Application, Exh. 3, at 2.

[83] *See* Constellation Transfer Application, Exh. 2, at 2.

[84] *See* MCHI Sharing Agreement §§ 2.2, 2.3; Constellation Sharing Agreement §§ 2.2, 2.3.

capitalization of the industry have declined dramatically over the past several years. MCHI and Constellation are not unlike most other satellite companies. They have yet to generate significant revenue and have invested collectively in excess of $115 million in costs, which is far in excess of the consideration being paid by ICO for their operations. Thus, neither MCHI nor Constellation are realizing a profit from the proposed transactions. Rather, the proposed transactions represent an opportunity for MCHI and Constellation to recoup some of their losses and remain participants in the satellite industry through their ownership interest in ICO.

C. Waiver of the Anti-Trafficking Rule Would Advance the Underlying Policy Objectives and Serve the Public Interest

The Commission's stated purpose in adopting the satellite anti-trafficking rule is to: (1) prevent unjust enrichment of those acquiring licenses for speculative purposes; and (2) avoid delay in service to the public as a result of an intent to sell licenses for profit, rather than implement service.[85] In the event the Commission determines that the anti-trafficking rule prohibits the proposed transfers of control, a waiver of the rule is warranted under the special circumstances presented and would advance the rule's underlying purpose.

Specifically, approval of the proposed transfers of control would permit MCHI and Constellation to access spectrum authorized under their licenses and provide service within the existing milestone timeframe. In proposing to eliminate the anti-trafficking rule, the Commission has acknowledged that "facilitating sales of satellite licenses with the original milestone schedule would result in provision of service to the public more

[85] *See Amendment of the Commission's Space Station Licensing Rules and Policies*, Notice of Proposed Rulemaking and First Report and Order, 17 FCC Rcd 3847, 3884 ¶ 110.

quickly than cancellation of the license and issuing a new license with a new milestone schedule."[86] Moreover, the proposed transfers of control would permit MCHI and Constellation to implement service more quickly than otherwise would be possible, given the substantial progress made in the deployment of the ICO system. Thus, a waiver of the anti-trafficking rule would advance its underlying purpose by avoiding delay in service to the public.

Furthermore, the substantial investments of time, money, and resources that MCHI and Constellation have made in the development of their systems render it extremely unlikely that they acquired their licenses with any speculative intent. In addition, their current shareholders will not reap any profit as a result of the proposed transfers of control. Thus, a waiver of the anti-trafficking rule would not result in any unjust enrichment.

V. COMMISSION RULES PERMIT 2 GHz MSS LICENSEES TO AGGREGATE SPECTRUM

The Terrestrial Carriers' mistakenly claim that the Commission's rules prohibit 2 GHz MSS licensees from aggregating spectrum. No such rule exists.[87] The Terrestrial Carriers cite the *3G FNPRM*, where the Commission simply referred to "construction of eight separate [2 GHz MSS] systems" and stated that an authorization would "become null and void if the particular system authorized is not constructed."[88] Even assuming that language taken from a notice of proposed rulemaking has any decisional

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[86] *Id.* at 3884 ¶ 111.

[87] As noted in Section IV above, the Commission has approved a number of satellite license assignments and transfers of control resulting in spectrum aggregation.

[88] *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Memorandum Opinion and Order and Further Notice of Proposed Rule Making, 16 FCC Rcd 16043, 16058 ¶ 35 (2001).

significance, nothing in the quoted language suggests that 2 GHz MSS licensees are prohibited from implementing their systems through sharing arrangements. As discussed in Section II(A) above, the Terrestrial Carriers' assumption that the milestone conditions prohibit satellite sharing is fatally flawed.

Furthermore, the Terrestrial Carriers claim that permitting spectrum aggregation would contradict language in the *2 GHz MSS Order* stating that "five megahertz of spectrum assigned to one system...is sufficient for commencement of service."[89] Nothing in this language, however, suggests that the Commission intended to limit 2 GHz MSS licensees to only a total of 2.5 x 2 MHz of spectrum. That the Commission adopted a band plan that allowed 2 GHz MSS licensees to acquire significantly more than 2.5 x 2 MHz of spectrum undercuts the Terrestrial Carriers' argument.

Specifically, the Commission contemplated that 2 GHz MSS licensees would be permitted to acquire additional "expansion" spectrum for service to underserved areas, "whether or not [the authorized systems] are operational."[90] The Commission also allowed 2 GHz MSS licensees to "aggregate Selected Assignments by reaching agreement for sharing of those assignments among themselves."[91] These opportunities given to 2 GHz MSS licensees clearly demonstrate the Commission's intent to permit licensees to aggregate additional spectrum, rather than impose an arbitrary spectrum cap. Moreover, the Commission's consideration of proposals to reallocate some 2 GHz MSS spectrum, including expansion spectrum, for other uses has only exacerbated the legitimate need of 2 GHz MSS licensees to acquire additional spectrum from other

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[89] *See* Petition of Terrestrial Carriers at 25 (citing *2 GHz MSS Order* at 16138 ¶ 17).

[90] *2 GHz MSS Order* at 16146 ¶ 35.

[91] *Id.* at 16140-41 ¶ 22.

licensees. Consequently, spectrum aggregation not only is permissible, but also may be necessitated by the shortage of available 2 GHz MSS spectrum.

VI. Conclusion

Based on the foregoing, the Applicants urge the Commission to dismiss the Petition for lack of standing and deny the Petition on its merits.

Respectfully submitted,

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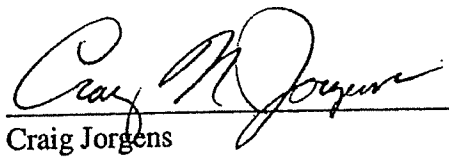

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VI. Conclusion

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AFFIDAVIT OF
C.J. WAYLAN
PRESIDENT AND CEO
OF
CONSTELLATION COMMUNICATIONS HOLDINGS, INC.

I, C.J. Waylan, hereby declare that I am President and Chief Executive Officer of Constellation Communications Holdings, Inc. ("Constellation"). I am submitting this affidavit in conjunction with the Joint Opposition to Petition to Deny submitted by Constellation, Mobile Communications Holding, Inc. and ICO Global Communications (Holding) Limited.

A. The Petition to Deny the Applications of Constellation for Modification of License (SAT-MOD-20020719-00103) and Transfer of Control (SAT-T/C-20020718-00114) filed by AT&T Wireless Services, Inc., Verizon Wireless and Cingular Wireless, LLC ("Terrestrial Carriers") alleges that the proposed transfer of control from Constellation to ICO is a violation of the Commission's anti-trafficking rules. ("Petition to Deny at 21-24) In support of this contention, the Terrestrial Carriers state that "There is no evidence that . . . Constellation had any intent to build." (Petition to Deny at 22)

B. Contrary to the statements made by the Terrestrial Carriers, Constellation is not selling bare licenses and has over the course of many years demonstrated that its sole interest is the development and implementation of Mobile Satellite Services. In support of this fact, I hereby attest to the following:

1. Constellation was founded in 1991 for purposes of bringing mobile satellite services (MSS) to all parts of the world.

2. Constellation was issued licenses to construct, launch and operate a MSS system in the 1.6/2.4 GHz bands in 1997 and in the 2 GHz bands in 2001.

3. Constellation since its founding has diligently pursued the development of MSS. The following is a list of some of the companies that have made a substantial investment in Constellation since its founding.

   - Bell Atlantic Corporation
   - Raytheon Corporation
   - Orbital Sciences Corporation
   - ASRC Aerospace
   - Spacevest

4. Constellation has diligently pursued its MSS technical program since its inception. It organized and managed a broad-based, integrated project team to develop its MSS system, including such companies as Orbital Sciences Corporation (space segment), Lockheed Martin (system

integration), Raytheon-E-Systems (ground segment), Stanford Telecom(later purchased by Alcatel) (waveform) and Texas Instruments (phased array antenna).

5. A contract was executed and remains in effect for the construction of the first generation Constellation satellite system. Significant work has been performed in support of the implementation of the Constellation MSS system including the development of specifications for:

   - the overall system and segment level designs,
   - proprietary air interface,
   - proprietary satellite phased array antenna , and
   - proprietary high gain antennas for fixed customer applications in the equatorial region.

6. In conjunction with its technical development program, Constellation developed a unique business plan, based on proprietary market research, with an initial focus on market opportunities in the equatorial program that could be efficiently extended to global coverage.

7. Constellation established a subsidiary in Brazil, known as Constellation Communications do Brasil ("CC do Brasil") for the purpose of obtaining an operating license and to provide the corporate vehicle for entering into gateway operator agreements. Anatel approved CC do Brasil's request for operating authority in April 1999.

C. The transaction with ICO was prompted by the current market environment and a recognition of the significant efficiencies that could be created by using a shared platform to bring important new telecommunication services to the American public.

D. Constellation has invested approximately $35 million in the development of its MSS system.

E. The amount of money expended by Constellation in pursuit of the development of its business is substantially in excess of the value of the consideration being provided to the parent company of Constellation (CCI International N.V.) in the ICO/Constellation transaction. It is my understanding that ICO is filing more specific information regarding the consideration it paid to acquire Constellation under a request to withhold the information from public inspection.

I, C.J. Waylan, do hereby declare that I have prepared the foregoing affidavit, and that the statements contained therein are true and correct to the best of my knowledge, information and belief.

C.J. Waylan

9/18/02

Date

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AFFIDAVIT OF DAVID CASTIEL,
PRESIDENT AND CEO OF
MOBILE COMMUNICATIONS HOLDINGS, INC.

I, David Castiel, hereby declare that I am the President and the Chief Executive Officer of Mobile Communications Holdings, Inc. ("MCHI"), and its wholly owned subsidiary, ESBH, Inc. ("ESBH"). I am submitting this affidavit in conjunction with the Joint Opposition of MCHI, Constellation Communications Holdings, Inc., and ICO Global Communications (Holdings) Limited ("ICO") to the Petition to Deny filed by AT&T Wireless Services, Inc., Verizon Wireless, and Cingular Wireless, LLC ("Terrestrial Carriers") against the Applications of MCHI for Modification of MCHI's 2 GHz Mobile-Satellite Service ("MSS") license ("2 GHz License") (SAT-MOD-20020719-00105) and to the Transfer Control of ESBH to ICO (SAT-T/C-20020718-00104). The Commission approved the pro forma assignment of the 2 GHz License to ESBH on September 11, 2002 (SAT-ASG-20020719-00106). Pursuant to such Commission approval, most of the assets of MCHI, including the 2 GHz License, will be transferred to ESBH in the near future and ESBH will be the successor in interest to MCHI. MCHI is a wholly-owned subsidiary of Ellipso, Inc., which also holds a controlling, majority interest in Virtual Geosatellite, LLC,("Virtual Geo"), an applicant for a license in the pending Ku Band NGSO proceeding, and wholly owns INEVA.com, an Internet Service Provider.

A. Over the course of the past twelve years Ellipso and its subsidiary company MCHI have directed the majority of their activity and expenditures toward the construction, launch and operation of a mobile satellite system (MSS). In support of the Joint Opposition, I hereby attest to the following:

1. MCHI was founded in 1990 (and later reincorporated as a Delaware corporation in 1991 by its board of directors) to develop and deploy a global MSS system and consistently has pursued this business objective since its founding. I am one of the founders of MCHI.

2. An MCHI subsidiary first applied for a 1.6/2.4 GHz band MSS license for MCHI's global Ellipso MSS system in November 1990. The subsidiary was the first entity to file an application in the 1.6/2.4 GHz MSS processing round. The FCC issued MCHI the 1.6/2.4 GHz MSS license in June 1997 (IBFS No. SAT-A/O-19901107-00066, Call Sign S2111). During those seven years, MCHI expended almost all of its resources and personnel to obtain its 1.6/2.4 GHz MSS license and further refine the design of its proposed Ellipso global MSS satellite constellation. The MSS system would have utilized a unique and proprietary orbital architecture developed by MCHI that would have enabled the system to tailor the geographic and temporal distribution of satellite capacity to coincide with population density and time of day. As a result of this patented architecture, the system could have provided global service with only 16 uncomplicated satellites that could be deployed in stages, with each stage capable of providing full service to its coverage area. This would have enabled MSS services to be sold at wholesale for just pennies a minute. Despite very substantial progress in designing and constructing the MSS system, MCHI's ability to deploy the system was undermined by the delay in the issuance of its 1.6/2.4 GHz license, which was granted by the FCC two and a half years after 1.6/2.4 GHz MSS licenses were granted to the other initial applicants, and the collapse of the MSS industry.

Following Iridium's bankruptcy, debt and equity financing became unavailable to MCHI and other MSS companies. In an action vigorously opposed by MCHI, in May 2001, the Commission's International Bureau ("Bureau") voided MCHI's 1.6/2.4 GHz MSS license. MCHI filed with the full Commission an application for review of this Bureau decision.

3. MCHI applied for the 2 GHz MSS License on September 26, 1997 and for nearly four years diligently prosecuted its application and participated in related Commission proceedings, including the 2 GHz MSS allocation and service rule proceedings and the proceeding concerning the relocation of incumbent terrestrial 2 GHz licensees. The FCC issued the 2 GHz License on July 17, 2001 (FCC File NO. 180-SAT-P/LA-97(26), IBFS Nos. SAT-LOA-19970926-00150, SAT-AMD-20001103-00157, Call Sign S2318).

4. MCHI initially intended to use the 2 GHz license for its second generation MSS system, using similar proprietary orbital geometry as the first generation Ellipso system. After the Commission voided MCHI's 1.6/2.4 GHz MSS license, however, the 2 GHz system became its primary MSS system. Following the bankruptcies of Globalstar and Iridium, the only two currently operating and privately developed MSS systems, it became impossible to obtain sufficient funding to construct and launch a global MSS system. MCHI recognized the significant efficiencies that can be generated by using a shared satellite platform to provide MSS services, and recognized the importance of employing its assigned spectrum to provide services to the public in the shortest time possible. Therefore, MCHI ultimately agreed to purchase a portion of the capacity of the ICO MSS system, and, in the alternative and with Commission approval, to transfer control of ESBH to ICO.

5. MCHI has aggressively and diligently pursued the licensing, development, and deployment of its MSS system for the past twelve years. MCHI earlier employed 38 personnel, although it has since reduced its staff size as a result of the downturn in the MSS industry. During this time, MCHI raised and expended nearly $80 million and the following companies have made substantial investments (in cash, in kind, or both) in MCHI:

   - The Boeing Company
   - Venture First II, LLC
   - Israel Aircraft Industries Ltd.
   - HarbourVest Partners
   - L-3 Communications Corporation
   - Lockheed Martin
   - Harris Corporation
   - Westinghouse

6. In the course of engineering design work MCHI developed and patented, or applied for patents for, significant proprietary technology, including advanced orbital geometries, satellite antenna, solar arrays, satellite mobile handsets, fixed satellite

phone booths, and switching equipment. MCHI holds approximately 32 issued and pending domestic and international patents, a list of which was attached to MCHI's transfer of control application. In addition, MCHI developed a unique business plan for its MSS system to take advantage of MCHI's proprietary orbital technology to offer global MSS services at a cost to customers that is substantially less than any operating MSS provider. Moreover, MCHI has expended substantial sums representing its interests in FCC and ITU regulatory proceedings related to the MSS system. Ellipso has for many years been a Sector Member of the International Telecommunications Union ("ITU"), participated actively in the development of the Global Mobile Personal Communications Service Memorandum of Understanding ("MOU") (and, in fact, was the first industry signatory to the MOU), and participated actively in many of the ITU's activities that led to IMT 2000 spectrum allocations and standards.

7. Through MCHI's sister company, Virtual Geosatellite, LLC ("Virtual Geo"), Ellipso has applied for a NGSO Ku band license to operate a global fixed satellite services (FSS) system that uses a different proprietary orbital geometry than the Ellipso system. The Virtual Geo orbital geometry will enable the Virtual Geo system to provide coverage equivalent to the coverage provided by satellites in the geostationary arc but without interfering with the operations of those satellites, thus allowing complete and repeated reuse of the valuable spectrum utilized by geostationary satellites. Ellipso currently is developing strategic partnerships for Virtual Geo and believes Virtual Geo has very significant commercial and national defense applications. In addition, through the development and operation of another subsidiary INEVA.com, Ellipso has created an Internet Service Provider. Through this subsidiary, Ellipso intends to develop Internet-related applications specific to both MSS and to the broadband FSS system represented by Virtual Geo.

B. In addition to the 2 GHz License, ICO is acquiring substantial intellectual property developed by MCHI during MCHI's development and design of its first and second generation MSS systems, including approximately 32 pending and issued domestic and international patents and approximately 30 pending and issued domestic and international trademarks. The Ellipso orbital technology will offer ICO additional options for tailoring the delivery of its satellite system capacity to population centers at a lower cost than its competitors. Thus, ICO is acquiring significant intellectual property and other assets in addition to the 2 GHz License. MCHI's intellectual property will enable ICO to achieve a variety of technical efficiencies and benefits.

C. Neither MCHI, nor its principals or investors will profit from ESBH's proposed merger with ICO. The amount of money expended by MCHI to develop its Ellipso MSS system and obtain the 2 GHz License is substantially in excess of the value of the consideration being provided to MCHI's shareholders by ICO to acquire ESBH pursuant to the stock purchase agreement between MCHI and ICO. It is my understanding that ICO is filing an affidavit of Craig Jorgens that includes more specific information regarding the consideration ICO paid to acquire ESBH under a request to withhold the information from public inspection.

I, David Castiel, do hereby declare that I have prepared the foregoing affidavit, and that the statements contained herein are true and correct to the best of my knowledge, information and belief.

David Castiel
President and CEO
Mobile Communications Holdings, Inc.

9/18/02
Date

CERTIFICATE OF SERVICE

I, Gwendolynne M. Chen, hereby certify that a copy of the foregoing **Joint Opposition to Petition to Deny** has been served this 18th day of September 2002 via electronic mail, hand delivery (*), or facsimile (**) on the following:

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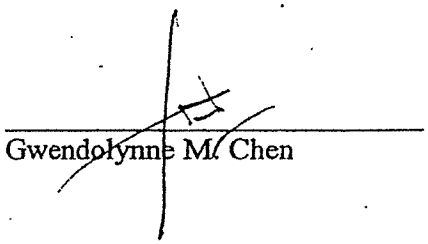

Gwendolynne M. Chen

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